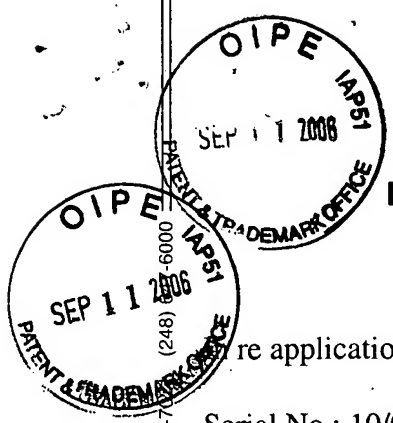


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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES

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re application of: Ferree

Serial No.: 10/007,477

Group No.: 3732

Filed: November 8, 2001

Examiner: D. Comstock

For: ENHANCED SURFACE AREA SPINAL FUSION DEVICES AND ALIGNMENT
APPARATUS THEREFOR

APPELLANT'S RESPONSE TO
NOTICE OF NON-COMPLIANT APPEAL BRIEF

Mail Stop Appeal Brief
Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Appellant received a Notice of Non-Compliant Appeal Brief on the grounds that:

"4. (a) The concise explanation lacks a reference to the specification by page and line number for each element of the independent claims (i.e. the subject matter defined therein). It is noted that a general reference to an extended section of the specification and/or to several drawings does not facilitate verification of each element of the claims." (Mailed 08/07/2006)

Appellant believes this Notice is unwarranted on several grounds. First, the Examiner is re-writing 37 CFR §41.37(c)(1)(v), which reads as follows:

"The brief shall contain ... a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, which shall refer to the specification by page and line number, and to the drawing, if any, by reference characters."

The rule is silent as to requirement that a reference be given to the specification by page and line number *for each element of the independent claims*.

Second, Appellant's "Summary of Claimed Subject Matter," reproduced below, meets the requirements of the Rule.

“Independent claim 1 is directed to an enhanced-surface-area spinal fusion apparatus adapted for use between an upper vertebral body having an inferior vertebral endplate and a lower vertebral body having a superior endplate, the distance between the endplates defining at least one intervertebral spacing. The device comprises a biocompatible fusion device (i.e., 200; 448; 602) having a height which is greater than the intervertebral spacing such that when implanted, at least a portion of the device penetrates into one or both of the upper and lower vertebral bodies. A fastener (630) is configured to extend through the device and the vertebral body into which the fusion device extends, and a separate, removable guide (604, 610) is used for drilling and installation of the fastener. (Specification, page 11, line 5 to page 12, line 10; Figures 6A-D).

Independent claim 12 is also directed to an enhanced-surface-area spinal fusion apparatus adapted for use between an upper vertebral body having an inferior vertebral endplate and a lower vertebral body having a superior endplate, the distance between the endplates defining at least one intervertebral spacing. The device comprises a biocompatible fusion device (i.e., 200; 448; 602) having a lateral surface and a height which is greater than the intervertebral spacing such that when implanted. At least a portion of the device penetrates into one or both of the upper and lower vertebral bodies, and a fastener (630) extends through at least a portion of at least one of the vertebral bodies and into the lateral surface of the fusion device. (Specification, page 11, line 5 to page 12, line 10; Figures 6A-D).”

As the Board will see, every opportunity that Appellant had to refer to the Specification, or the drawings was taken. Note that the Rule states that Appellant “shall refer ... to the drawing, if any, by reference characters.” Appellant can refer only to those reference characters which actually exist, and Appellant has done so.

Third, Appellant did not make “a general reference to an extended section of the specification and/or to several drawings. Rather, Appellant referred to *just over one page of the specification* and a *single figure* (albeit with subparts). Appellant’s references were well thought out and narrowly tailored to the subject matter of the independent claims. Such specifically directed references clearly “facilitate verification of each element of the claims.”

In summary, Appellant’s brief meets the requirements of 37 CFR §41.37(c)(1)(v). Indeed, since Appellant could not determine a way to be more precise, this reply was written instead of complying with the Examiner’s mandate, which also misrepresents the applicable Rule.

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Respectfully submitted,

By: 

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Date: September 7, 2006